Supreme Court, U. S.
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In the

SUPREME COURT

of the

UNITED STATES

October Term, 1977

CASE NO. 77-883

MICHAEL DAPPALONIA,

Appellant,

vs.

BOARD OF CHIROPRACTIC EXAMINERS
of the STATE OF FLORIDA,

Appellees.

ON APPEAL FROM THE FOURTH
DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA

MOTION TO DISMISS OR AFFIRM

ROBERT L. SHEVIN
Attorney General

CHARLES S. RUBERG
Assistant Attorney General
Department of Legal Affairs
The Capitol, Room 1501
Tallahassee, Florida 32304

Attorneys for Appellees

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The Appellee in the above-entitled case moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Fourth District Court of Appeal of Florida on the grounds that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on by the Court below, that the question presented is so unsubstantial as not to need further argument, that the judgment below rests on an adequate non-federal basis, and that in the proceedings below the Appellant was accorded procedural and substantive due process of law which exceeded the minimum requirements in that regard as guaranteed by the Fourteenth Amendment to the United States Constitution such that after due notice, a full evidentiary hearing, and two judicial review procedures, the decision below, in Appellee's favor, is not in conflict with any decision of this Court, and is so obviously correct as to warrant no further review.

I.

THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE

A. THE STATUTES

This appeal is brought pursuant to the authority of 28 U.S.C., §1257(2), which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

However, nowhere in his Jurisdictional Statement does Appellant cite any provision of the Florida Statutes, which is the official codification of general laws enacted by the legislature of this State, or the Laws of Florida, which is the official compilation of the enactments of the Florida legislature in each annual legislative session, for the purpose of claiming its repugnancy to the Fourteenth Amendment to the Constitution of the United States. Likewise, Appellant has failed to cite any provision of the Florida Administrative Code, which is the official codification of rules and regulations of the agencies of the executive branch of government of this State, including the Board of Chiropractic Examiners, for this purpose.

B. THE PROCEEDINGS BELOW

On September 2, 1975, the FLORIDA STATE BOARD OF CHIROPRACTIC EXAMINERS (hereinafter Board) issued an Administrative Complaint against Michael Dappalonia, D.C., the Appellant, which is incorporated herein as Appendix A. The Board was seeking to revoke, annul, withdraw or suspend Dr. Dappalonia's license to practice chiropractic upon allegations set out in three counts. Count I charged Dr. Dappalonia with violations of §460.13(3)(n), F.S., and Rule 21D-1.01, Florida Administrative Code.

Section 460.13(3)(n), Florida Statutes, authorizes the revocation or suspension of a license to practice chiropractic upon proof of guilt of violating any of the provisions of Ch. 460, F.S., (regulating the profession of chiropractic), or any of the rules and regulations of the Board. Rule 21D-1.01, F.A.C., implements the scope of practice limitations of §460.11, F.S., by prohibiting the use of diagnostic or treatment instruments, the use of which are not taught in the regular course of instruction in approved colleges of chiropractic. The Complaint alleged that Dr. Dappalonia utilized such an instrument on one of his patients.

Counts II and III charged Dr. Dappalonia with violations of Sections 460.13(3)(f)(h) and (m), F.S. These

provisions permit a revocation or suspension upon proof of: making any untrue, false, fraudulent, misleading, deceptive, extravagant, or grossly improbable claims or statements, concerning the science or practice of chiropractic; being in any way guilty of deception, misrepresentation, or fraud in the practice of chiropractic; and being guilty of unprofessional conduct, which is defined in relevant part to mean any conduct which is reasonably likely to deceive or defraud the public.

The alleged conduct supporting these charges was Dr. Dappalonia's use of the afore-described instrument, his claims and representations regarding it, his prescription of purported medication, alleged to be sugar pills, and his claims and representations regarding them to the same patient described in Count I.

Also, included in the Administrative Complaint was a detailed explanation of Dr. Dappalonia's rights pursuant to the Florida Administrative Procedure Act, Ch. 120, F.S., and a form which he could check-off and return indicating his election of the type of adjudicatory proceeding he desired. Dr. Dappalonia elected a formal proceeding pursuant to §120.57(1), F.S.

Consequently, the assignment of the case to a Hearing Officer of the Division of Administrative Hearings, Department of Administration was requested and granted. §§120.57(1)(a)(1) and (1)(b)(3), F.S. After reasonable notice, §120.57(1)(b)(2), F.S., including ample time for preparation, a full evidentiary hearing was conducted before the aforesaid, independent Hearing Officer, on January 26, 1976.

At this hearing Dr. Dappalonia was represented by the attorney of his choice and was guaranteed the rights to respond to the allegations, present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, and to file exceptions to any order or hearing officer's recommended order, §120.57(1)(b)(4), F.S.

Dr. Dappalonia, and his attorney, had the opportunity to and did utilize whichever of these rights they deemed to be in his best interest.

On April 16, 1976, the Hearing Officer issued his Recommended Order consisting of his separately stated findings of fact, conclusions of law, and recommended penalty, and submitted the said Order to the Board and to Dr. Dappalonia, as required by §120.57(1)(b)(8), F.S. Pursuant to this same statute, Dr. Dappalonia had ten days within which to submit to the Board

written exceptions to the recommended Order, but chose not to do so.

On July 15, 1976, the Board held a public meeting at Orlando, Florida, which was its next regularly scheduled business meeting subsequent to receipt of the Hearing Officer's Recommended Order regarding Dr. Dappalonia. Notice of this meeting was published at least fourteen days prior thereto in the Florida Administrative Weekly, a publication of this State through the Florida Department of State which serves as the official organ through which the public may be informed of the activities of the agencies of this State. See §§120.53(1)(d), 120.54(1), 120.55(1)(c), F.S. Copies of the agenda of the meeting were available to the public at least seven days prior thereto, pursuant to §120.53(1)(d), F.S., and included the consideration of and action on the Recommended Order regarding Dr. Dappalonia.

There being no exceptions to the Recommended Order, submitted to the Board either by its Special Prosecutor, who had represented the Board before the Hearing Officer, or by Dr. Dappalonia, the Board was limited to consideration of those matter which constituted the record of the proceedings pursuant to §120.57(1)(b)(5), F.S. Further, the Board's authority to act had to be within the limitations of §120.57(1)(b)(9), F.S., which precludes

rejection or modification of the Hearing Officer's findings of fact except under circumstances not material here, precludes imposition of a more severe penalty than recommended with a similar exception, and permits the Board to substitute its conclusions of law for that of the Hearing Officer which was deemed not necessary in this case.

The Board voted unanimously to adopt, in toto, the Recommended Order, and thereafter a Final Order implementing this decision was reduced to written form and served on Dr. Dappalonia pursuant to §120.59(1), F.S.

Dr. Dappalonia sought judicial review of Board's Final Order pursuant to §120.68(2), F.S., to the appropriate district court of appeal of Florida. By Rule 4.1, Florida Appellate Rules, such petitions for review of agency action are by certiorari as otherwise provided by the Florida Appellate Rules.

Dr. Dappalonia's "Petition For A Writ Of Certiorari To The Board of Chiropractic Examiners," incorporated herein as Appendix B asserted that the Board's Final Order "departed from the essential requirements of law" in four particulars, to-wit: (1) the Board failed to follow the procedures required by the Florida Administrative

Procedures Act, Ch. 120, F.S., by failing to permit oral argument by Dr. Dappalonia's legal counsel at the time of consideration of the Recommended Order and by failing to include in its Final Order rulings on Dr. Dappalonia's proposed findings of fact and requested conclusions of law; (2) there were no findings of fact that Dr. Dappalonia was acting as a chiropractor when using the diagnostic instrument in question; (3) the Board exceeded its authority in rendering its final order contrary to §§460.24 and 460.262, F.S.; and (4) Dr. Dappalonia could not be guilty of using a diagnostic instrument not taught at approved colleges of chiropractic because the Board had not validly adopted any list of approved colleges.

After receiving briefs from the respective parties, on the issues so raised, the District Court of Appeal for the Fourth District of Florida, in a per curiam order without written opinion, denied the Petition for Writ of Certiorari, on April 7, 1977. Dr. Dappalonia's Petition for Rehearing incorporated herein as Appendix D, was considered and denied on May 25, 1977.

Subsequently, Dr. Dappalonia filed with the Florida Supreme Court, a "Petition For A Writ Of Certiorari To The District Court of Appeal, Fourth District," which is incorporated herein as Appendix C. This petition, although erroneously relying on Article 5, Section 4, Florida Constitution,

relating to the jursidction of the district courts of appeal, was obviously intended to be grounded on Article V, Section 3, Florida Constitution, and more specifically on subsection (b), paragraph 3, thereof, which confers, in relevant part, certiorari jurisdiction on the Supreme Court as to a decision of a district court of appeal "that is in direct conflict with a decision of any district court of appeal or of the Supreme Court on the same question of law. . . ."

The sole issue so presented was whether or not the Board's order departed from statutory requirements (§120.59(2), F.S.) by failing to include explicit rulings on each finding of fact and conclusion of law submitted by Dr. Dappalonia, so that the Fourth District Court of Appeal's denial of certiorari constituted a decision in conflict with the decision of the First District Court of Appeal in Stuckey's of Eastman, Georgia v. Department of Transportation, 340 So.2d 119 (Fla. 1st D.C.A., 1976).

In essence, Dr. Dappalonia argued that failure to provide such explicit rulings on issues presented by him denied him the rights secured by the Administrative Procedure Act, Ch. 120, F.S., to-wit:

> "... the right to raise pertinent factual issues for administrative determination, to submit proposed findings on those issues, to receive an explicit ruling on the matters thus submitted and to preserve them for Judicial review." Stuckey's at 120.

The Board's counter argument was essentially that no issues were presented by Dr. Dappalonia's Proposed Recommended Order, submitted to the Hearing Officer, which were not explicitly or by necessary implication determined in the Recommended Order issued by the Hearing Officer which was adopted, in toto, and incorporated in the Board's Final Order, thus creating no conflict.

On September 23, 1977, the Florida Supreme Court denied Dr. Dappalonia's Petition on the ground that it was without jurisdiction.

The instant appeal was thereafter initiated.

II.

ARGUMENT

THE UNITED STATES SUPREME COURT HAS NO JURISDICTION TO HEAR THIS APPEAL PURSUANT TO THE AUTHORITY OF 28 U.S.C., §1257(2)

By his own assertion, Appellant is seeking to invoke the jurisdiction of this Court by authority of 28 U.S.C., §1257(2), which reads:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Appellee will concede that the per curiam order without opinion of the Fourth District Court of Appeal of Florida, which denied Dr. Dappalonia's Petition for Writ of Certiorari to review the Appellee's Final Order, constitutes a final decree by the highest court of this State in which a decision could be had, in view of the decision of the Florida Supreme Court that it had no jurisdiction to undertake judicial review.

However, at no point in the proceedings below was there a challenge to the validity of any "statute" of the State of Florida on the grounds of its being repugnant to the Constitution or any law of the United States. Consequently, the decision appealed from cannot be said to favor the validity of such statute as against such challenge.

Therefore, it must be assumed that Appellant is contending that the "statute" for purposes of Section 1257 (2) jurisdiction is the Final Order of the Board or is somehow the entire process by which his license was revoked. Such a contention must fail.

Although this Court has many times defined the term "statute" as used herein to include every legislative action to which a state gives the force of law, it is the exertion of the State's law-making power, regardless of the State agency exercising such power, by an act which is legislative in character which gives rise to this Court's jurisdiction. Lathrop v. Donohue, 367 U.S. 820, 824, 6 L.ed.2d 1191, 1195, 81 S.Ct. 1826 (1961). See also Williams v. Bruffy, 96 U.S. 176, 183.

In the Lathrop case, supra, the State action in question was an order of the Wisconsin Supreme Court integrating the Bar of that state for the

purpose of regulating the practice of law. The legislative character of that action was clear because of the general applicability of that order to all persons similarly situated. Likewise in the case of Live Oak Water Users' Asso. v. Railroad Commission, 269 U.S. 354, 70 L.Ed. 305 (1926), an order of a regulatory commission of the State of California was deemed to be a "statute" for jurisdictional purposes, but again this was an order which fixed the rates chargeable by a public utility and as such was also an action of general applicability to a class of affected persons.

Under Florida law a clear distinction has been made between acts of governmental agencies which may be said to be legislative in nature and those which are adjudicatory in nature. Sections 120.52(9) and (14), Florida Statutes, respectively provide definitions for the terms "order" and "rule" as applied to actions by administrative agencies of this State, specifying:

> "'Order' means a final agency decision which does not have the effect of a rule and which is not excepted from the definition of a rule, whether affirmative, negative, injunctive, or declaratory in form. ...;

> 'Rule' means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. ..."

Clearly, it was intended that "rules" would include all administrative actions,legislative in character, by an agency, and "orders" would include actions which were adjudicatory in nature. The Appellee obviously intended its proceedings against Dr. Dappalonia to be for the entry of an order, adjudicating his privilege to practice chiropractic, and not for the adoption of a rule, having general applicability to persons affected by Board action. Had the contrary been the case, the Board would have followed the rule adoption procedures set out in §120.54, F.S., rather than the provisions controlling actions which determine a party's substantial interests included in §120.57, F.S., which provisions were scrupulously followed in the administrative forum, as supported by the orders affirming this by the Florida District and Supreme Courts.

At no point in the proceedings below did Appellant assert any claim that the Board was,in fact, engaged in rule adoption proceedings or that any provision of §120.54, F.S., should have been applicable. Therefore, there is no foundation in the record to support a contention in favor of the legislative character of the challenged state action.

Any confusion on this point is generated by the manner in which Appellant chose to describe the Board's action. On page 4 of his Jurisdictional Statement, Appellant states:

> "On April 16, 1976, the Hearing Officer issued a Recommended Order deciding that Dr. Dappalonia was not guilty of prescribing medication as a Naturopath; but as a chiropractor was guilty of using a diagnostic instrument not taught in regular course of instruction in a college recognized by the Board of Chiropractic Examiners, and recommended that his Chiropractor's license be revoked."

This very imprecise description merely clouds the issue. The Board's Administrative Complaint very clearly charged Dr. Dappalonia with engaging in conduct which constituted, inter alia, violations of §§460.13(3)(h) and (n), F.S., which authorize revocation

where the chiropractic licensee: "... is in any way guilty of any deception, misrepresentation, or fraud in the practice of chiropractic; or has violated . . . any of the rules and regulations of the board." The Hearing Officer very specifically concluded that Dr. Dappalonia had violated both of these provisions.

The violations were not merely a result of his using a diagnostic instrument not taught at approved chiropractic colleges, but because the expert testimony revealed that the machine could not perform the functions which Dr. Dappalonia claimed it could, even over his patients' expressed skepticism.

Nonetheless, Appellant must avoid a clear description of the findings and conclusions resulting from the full, evidentiary hearing in order to support the line of defense he has consistently maintained. More specifically, Appellant merely claims that any of his acts which violate the provisions regulating chiropractic are done pursuant to his naturopath license, as to which discipline the Board of Chiropractic Examiners has no authority. Presumably, had the Board of Naturopathic Examiners brought a disciplinary action, he would have claimed that all of his actions were under authority of his chiropractic license.

Of course, none of this can change the facts: that a patient suspecting a pinched nerve problem expressly sought his chiropractic services; that he used a phony machine to diagnose the problem as insecticide poisoning, an ailment as to which she had no symptoms according to her family medical doctor; that he purported to treat her for this non-existing condition with sugar pills, stressing that they would not work unless she "believed in them"; that his treatment, of course, had no effect; and that he made a number of clearly misleading and deceptive representations in order to overcome the patient's skepticism.

From the foregoing, it is submitted that because of the nature of the proceedings below, no decision was ever rendered that could be construed as upholding the validity of any statute of this State for Section 1257(2) purposes, against any claim of repugnancy to the United State's Constitution.

Further, even if such a "statute" is assumed, arguendo, a review of the proceedings below reveals that no federal question was ever raised, and certainly was never raised with the specificity required for Section 1257(2) jurisdiction.

There was no reference, whatsoever, to any provision of the U. S. Constitution in the Board's Administrative Complaint, the Hearing Officer's Recommended Order, the Board's Final Order, nor in either per curiam denial of certiorari by the Florida Fourth District Court of Appeal and the Florida Supreme Court.

It is axiomatic that once a case reaches this Court, review is limited to specific federal questions that were properly raised in the State courts. Live Oak Water Users Association v. Railroad Commission, 269 U.S. 354, 357-8; Lynch v. New York ex rel. Pierson, 293 U.S. 52, 54. Likewise, a litigant is precluded from urging a federal issue that was not raised or decided below even though such an issue could have been so raised. Safeway Stores v. Oklahoma Grocers, 360 U.S. 334, 342, n.7; Cardinals v. Louisiana, 394 U.S. 437, 438.

Appellant has taken no issue with the procedures followed in the administrative forum up to that point where the Hearing Officer issued his Recommended Order and caused its delivery to both the Board and to Dr. Dappalonia. In essence, Appellant's contention before this Court is that he was denied his right to due process of law, as guaranteed by the Fourteenth Amendment to the U. S. Constitution, because: (1) he did not receive notice as to

when the Board would consider and take action on the Recommended Order; and (2) his attorney was not permitted to present oral arguments to the Board prior to such consideration and action.

It is **true** that in his Petition for Writ of Certiorari filed with the Fourth District Court of Appeal, Appellant claimed that the Board had failed to permit oral argument, although the notice issue was not mentioned at all. However, this claim was based upon the ground that the Board's Order "departed from the essential requirements of law." There is not even a reference to any provision of the U. S. Constitution.

In the case of Oxley Stove Co. v. Butler County, 166 U.S. 648, 655, this Court enunciated, and has subsequently followed, the principle that:

> "The jurisdiction of this Court to reexamine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

As a result, the reference to the U. S. Constitution in the Oxley Stove case, supra, was deemed insufficient as were similar references in Herndon v. Georgia, 295 U.S. 441, 442-3, and Harding v. Illinois, 196 U.S. 78,88. Likewise, a reference to "due process of law" was held insufficient in Bowe v. Scott, 233 U.S. 658,664-5.

Thus, even if it is assumed that "departure from the essential requirements of law" involves concepts of constitutionally guaranteed due process of law, the assumption to be made is that reference is being made to a State Constitution. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67-8. This is particularly true if a State Constitution has a due process clause, such as Section 9, of Article I of the Florida Constitution which reads:

> "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself. (Emphasis supplied.)

See Bowe v. Scott, supra.

There can be no doubt that Dr. Dappalonia failed to properly raise a federal question before the Fourth District Court of Appeal. In his Petition for Rehearing before that Court, he merely argued that the denial of certiorari, as against his contention that the Board had failed to meet the requirements of the Administrative Procedure Act regarding the rejection of his proposed findings, was in conflict with a decision of the First District Court of Appeals. Likewise, in his Petition for Writ of Certiorari filed with the Florida Supreme Court, the only ground presented to invoke the jurisdiction of that Court was the alleged conflict of decisions on that point.

Since no explicit challenge on federal grounds was ever raised or decided, the authority of 28 U.S.C., §1257(2) cannot be used to invoke the jurisdiction of this Court. Largent v. Texas, 318 U. S. 418. Further, this rule is deemed to be not discretionary but jurisdictional. Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 334.

Appellee recognizes that this Court may take jurisdiction of a case by certiorari pursuant to 28 U.S.C., §1257(3), even where it is presented by appeal pursuant to 28 U.S.C., §1257(2). Further, it is submitted

that Appellant's own Jurisdictional Statement makes abundantly clear that he should be seeking this review by certiorari and not by appeal. Any reasonable reading of the said Jurisdictional Statement demonstrates that his real contention is that certain aspects of the process by which his license was revoked denied him rights which he held by virtue of the U. S. Constitution.

Nevertheless, regardless of whether review is sought by appeal or certiorari, the element of the substantiality of the federal question must be clearly shown. The federal question presented must be more than a formal one. It cannot be so absolutely devoid of merit as to be frivolous. Likewise, it cannot be so foreclosed by prior decisions, so as to leave no room for real controversy. Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311. Furthermore, if the federal question does not meet these standards, it is insubstantial and there exists cause for dismissal of the appeal or denial of certiorari. See Zucht v. King, 260 U.S. 174; Palmer Oil Corp. v. Amerado Corp., 343 U.S. 390.

On page 9 of his Jurisdictional Statement Appellant has cited the cases of Buchman v. State Board of Accountancy, 300 So.2d 671 (Fla. 1974),

and Smith v. Department of Registration and Education, 412 Ill. 332, 106 NE 2d 722. By authority of these cases, he asserts that in administrative proceedings, such as in the instant case, due process of law must be offered to the person subject to the administrative authority, and that such due process requires a definite charge, adequate notice, and a full, fair, and impartial hearing. Appellee agrees.

The administrative action against Dr. Dappalonia was initiated by the Board's issuing and serving on Dr. Dappalonia by certified mail an Administrative Complaint. The said Complaint set out specifically the conduct alleged to constitute the violations and further specified the statutes and rules alleged to have been violated. The Complaint also put him on notice of the Board's intent to seek revocation or suspension of his license on the basis of those allegations, and further put him on notice of his rights under the Administrative Procedure Act, which is specifically designed to guarantee due process of law.

Dr. Dappalonia elected a formal proceeding which in turn requires the strictest standards of due process among his available options. Consequently, in order to guarantee fairness and impartiality, §120.57(1),

F.S., requires such proceedings to be conducted by a full time, qualified hearing examiner whose only connection with the Board is that he sometimes may hear their cases along with those arising from other state agencies. Such a hearing officer was duly assigned.

Dr. Dappalonia had the opportunity to file a responsive pleading to the Administrative Complaint, but did not. There was a full two-month period between issuance of the Complaint and the evidentiary hearing itself, giving ample time for discovery, all forms of which are available in this State to litigants in administrative cases, the same as are available to litigants in civil cases before Florida courts. There was ample notice of the date, time, and place in which the hearing was to be conducted.

The hearing itself was conducted essentially as a civil trial before a court, except for the additional privilege against self-incrimination accorded to Respondents in revocation proceedings. Evidence and testimony was offered by both sides, cross-examination was made, arguments of respective legal counsel was heard and on the basis of the record so established the Hearing Officer made findings of fact, conclusions of law, and recommended the penalty of revocation.

It should be noted that from the time the Complaint issued until the Board and Dr. Dappalonia received the Recommended Order, no member of the Board attended, was directly involved in, nor received any information concerning the course of the proceedings. The prosecution of the charges is left to a Special Prosecutor who represents the Board before the hearing officer and who is an attorney other than the Board's regular legal advisor.

The purpose of this is obvious, it insures fairness and impartiality because there is assurance that in rendering a final order, the Board will limit its consideration to the established record as required by law.

At no point, including this appeal, has Appellant raised any objection on due process or other grounds regarding the proceedings up to the point of rendering and service of the Recommended Order. Appellant did not contest the Recommended Order at any time between its issuance or the Board's consideration thereof, even though he had by statute ten days in which to file exceptions thereto with the Board. There being no such exceptions the Board had nothing to consider apart from the record of the proceedings before the hearing examiner.

Therefore, Appellant's claim that he was denied due process because his attorney was not allowed to present oral arguments to the Board is totally insubstantial, without merit and frivolous.

Even if such arguments were permitted, they could not have interjected any new evidence into the proceedings, and Appellant's attorney had ample opportunity and did argue: all issues raised; his view of the probative value and effect of the evidence; and his legal theories of the case before the hearing officer. At this point it should also be noted that no arguments were presented to the Board by its Special Prosecutor, who did not attend the meeting, and that at no time, including this appeal, has Appellant objected on the basis of a lack of substantial, competent evidence to support the Hearing Officer's findings.

Appellant's claim, now raised for the first time, that he was denied due process because he did not receive notice of the meeting at which the Recommended Order was to be considered and acted on, is equally insubstantial, without merit, and frivolous. Since there were no exceptions filed, there was no cause for the

Board to anticipate any request for oral argument by Appellant, and therefore no need to give notice by mail or personal service on him.

Nonetheless, Appellant should have had ample notice of the meeting. Pursuant to §120.57(1)(b)(9), F.S., Appellant knew that the Board would have to render its Final Order within ninety days of receipt of the Recommended Order. The Board can only conduct business in a public meeting. Notice of all such meetings must be published in the Florida Administrative Weekly which is readily available in courthouses and libraries throughout the State, and certainly can be checked by a telephone call to its publisher, the Florida Department of State. Notice of the meeting in question was published at least two weeks prior thereto, and included a statement that copies of the agenda were available from the Board's offices, specifying the address. The agenda clearly stated under "Old Business," item 6A, that the Board would "consider the Recommended Order of the Hearing Officer in the case for the revocation or suspension of the license of Dr. Michael Dappalonia."

For the reasons set out in the foregoing it is submitted that Appellant has asserted no grounds on which

to invoke the jurisdiction of this Court either by appeal or certiorari.

III.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on by the Court below, that the question presented is so unsubstantial as not to need further argument, that the judgment below rests on an adequate non-federal basis, and that in the proceedings below the Appellant was accorded procedural and substantive due process of law which exceeded the minimum requirements in that regard as guaranteed by the Fourteenth Amendment to the United States Constitution such that after due notice and hearing, and two judicial review procedures, the decision below, in Appellee's favor, is not in conflict with any decision of this Court, and is so obviously correct as to warrant no further review, and Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment in the cause by

the District Court of Appeal for the Fourth District of Florida.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

Charles S Ruberg

CHARLES S. RUBERG
Assistant Attorney General
Department of Legal Affairs
The Capitol, Room 1501
Tallahassee, Florida 32304

Attorneys for Appellees.

PROOF OF SERVICE

I, CHARLES S. RUBERG, one of the Attorneys for Appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19 day of January, 1978, I served a copy of the foregoing Motion to Dismiss or Affirm on:

J. MICHAEL CARTER, ESQUIRE
P. O. Box 566
Crawfordville, Florida 32327

by mailing a true and correct copy, in a dully addressed envelope, with postage prepaid, to the named attorney of record for Appellant.

Charles S Ruberg

CHARLES S. RUBERG

The Capitol, Room 1501
Tallahassee, Florida 32304

APPENDIX A

STATE OF FLORIDA, DIVISION OF PROFESSIONS, DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATION, FLORIDA STATE BOARD OF CHIROPRACTIC EXAMINERS

In re the revocation or suspension
of the license of MICHAEL DAPPOLONIA,
D.C.
License No: 865

/

ADMINISTRATIVE COMPLAINT, EXPLANATION AND ELECTION OF RIGHTS

The Florida State Board of Chiropractic Examiners, hereinafter Board, upon knowledge and belief, files this Administrative Complaint against licensee, MICHAEL DAPPOLONIA, D.C., who holds license number 865. The Board seeks to revoke, annul, withdraw or suspend the referenced license and the licensee's right to practice thereunder based upon the following allegations:

Count I.

1. On or about a period from May, 1975, to June, 1975, licensee treated one Suzzanne Carter approximately three times per week. Prior to and during this period of treatment, Miss Carter had experienced and continued to experience periods of fainting and blacking out.

2. Treatment of Miss Carter by licensee included the use of a diagnostic instrument, the use of which is not taught in the regular course of instruction in a college recognized by the Florida State Board of Chiropractic Examiners.

3. Use of such an instrument violates Rule 21D-1.01, Rules of the State Board of Chiropractic Examiners, and as such constitutes a violation of Section 460.13(3)(n), Florida Statutes.

Count II.

4. The Board herein specifically adopts and realleges the matters as set forth in paragraphs 1 through 3 above.

5. That during the period of treatment described in paragraph 1 above, Suzzanne Carter received medication from the licensee in the form of tablets marked "I-Celoids" as well as other tablets, such tablets being prescribed at the rate of five (5) per hour.

6. Licensee represented to Suzzanne Carter that said pills were given to aid in the reduction of infection and elimination of headaches, when licensee knew or should have known that said pills were composed of a disaccharide or sugar and, therefore, could not reasonably be expected to produce the results as represented to Miss Carter and did not in fact produce those results.

7. Such misrepresentation, fraud and deception on the part of licensee as described above constitute violations of Sections 460.13(3)(f)(h) and (m), Florida Statutes.

Count III.

8. The Board herein specifically adopts and realleges the matters as set forth in paragraphs 1 through 7 above.

9. That during the period of treatment described in paragraph 1 above, licensee represented to Suzzanne Carter that through the use of the diagnostic instrument referenced in paragraph 2, licensee could measure Miss Carter's levels of vitality and infection, determine whether any bodily organ was malfunctioning and locate such a malfunction, when licensee knew or should have known that said instrument was incapable of making such determinations and did not in fact make such determinations.

10. Such misrepresentation, fraud and deception on the part of licensee as described above constitute violations of Sections 460.13(3)(f)(h) and (m), Florida Statutes.

WHEREFORE, this Administrative Complaint is issued pursuant to §120.60, Florida Statutes, and Chapter 460, Florida Statutes. Any proceeding concerning this Complaint shall be conducted pursuant to §120.57, F.S.

You have a right to request an administrative hearing, to be represented by counsel, to take testimony, to call and cross-examine witnesses, to have subpoena and subpoena duces tecum issued, and to present written evidence or argument if you request a hearing.

Pursuant to §120.60, F.S., you are given fourteen (14) days notice by certified mail of this action. Unless a request for hearing is received by certified mail on or before September 19, 1975, the Board will act in accord with §120.57(2), F.S., and dispose of this cause. A request for a hearing shall be sent to the Board of Chiropractic Examiners, Building B, Suite 202, 6501 Arlington Expressway, Jacksonville, Florida, 32211, and must include the following information:

(a) your name and address,

(b) a statement requesting a hearing,

(c) a copy of this administrative complaint.

II. EXPLANATION OF RIGHTS

In response to the allegations as set forth above in this administrative complaint, you may make any one of the following elections within 14 days from receipt of said administrative complaint:

1. If you determine that the allegations as set forth above contain no disputed issue(s) of material fact, you may then request an informal proceeding pursuant to Section 120.57(2), Florida Statutes, before the Board of Chiropractic Examiners, or in discretion of the Board of Chiropractic Examiners, a duly appointed member thereof, or another hearing officer appointed by the Board of Chiropractic Examiners, may be designated. In the event that you request an informal proceeding as contemplated by Section 120.57(2), Florida Statutes, you will be given an opportunity to present written evidence in mitigation of or in opposition to the agency's action or refusal to act as well as to the grounds upon which the agency has chosen to justify its action or inaction. At your request, and within the sole discretion of the Board of Chiropractic Examiners, you may be permitted an opportunity to personally appear before the Board of Chiropractic Examiners, in support of your written statement. Any request for an informal proceeding in this matter should be directed to the Board of Chiropractic Examiners in writing within 14 days of receipt of this Complaint.

2. If you determine that the allegations as set forth above contain any disputed issue(s) of material fact, you may request a formal proceeding and the appointment of a hearing officer to be furnished by the Division of Administrative

Hearings of the Department of Administration, pursuant to Section 120.57(1), Florida Statutes. Any request for a formal proceeding in this matter must be made in writing and directed to the Board of Chiropractic Examiners, Building B, Suite 202, 6501 Arlington Expressway, Jacksonville, Florida, 32211. Such request must contain the following information:

(a) your name and address,

(b) a request for hearings,

(c) a copy of the administrative complaint.

In the event that you fail to file a responsive pleading in this matter as enumerated in and required by paragraphs 1 or 2 above, within 14 days as provided above, your failure shall be considered as a waiver of your rights to a hearing as provided by Sections 120.57(1), Florida Statutes, and shall be cause for holding you in default and a default order may thereupon be rendered and the cause determined upon consideration of the record without any further notice to you in accordance with the disciplinary powers of this Board as enumerated in §460.138, Florida Statutes.

Mailed this 2nd day of September, 1975.

DR. EDWARD M. SAUNDERS
President, Board of Chiropractic Examiners

DR. PAUL VOGEL
Secretary-Treasurer
Board of Chiropractic Examiners

ELECTION OF RIGHTS

Signify your election by designation of the appropriate box.

1. I have read the Explanation of Rights section and understand the various options.

____ YES ____ NO

If you do not understand the options available, contact the Board for further explanation.

2. I do not dispute the allegations in the Administrative Complaint, as matters of fact, and therefore request an informal proceeding.

____ YES ____ NO

(a) I desire to present oral testimony in mitigation or opposition.

____ YES ____ NO

(b) I desire to submit a written statement in mitigation or opposition.

____ YES ____ NO

(c) I desire to be present at the hearing.

____ YES ____ NO

3. The allegations set forth in the Administrative Complaint do contain disputed issues of material fact and I hereby request that this be considered a petition for formal hearing before a hearing officer appointed by the Division of Administrative Hearings.

BEST COPY AVAILABLE

Regardless of the options elected herein, I understand that I will be given adequate notice of the date set for hearing of my case.

_____
Signature of Respondent

STATE OF _____

COUNTY OF _____

I HEREBY CERTIFY that on this day, before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, personally appeared _____ to me known to be the person described in and who executed the foregoing instrument and acknowledged before me execution of same.

WITNESS my hand and official seal in the county and State aforesaid, this _____ day of _____, 1975.

_____
NOTARY PUBLIC
My commission expires:

APPENDIX B

IN THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA.

CASE NO.

MICHAEL DAPPOLONIA,

Petitioner,

vs.

BOARD OF CHIROPRACTIC EXAMINERS OF THE STATE OF FLORIDA,

Respondent.
_____/

PETITION FOR A WRIT OF CERTIORARI
TO THE BOARD OF CHIROPRACTIC EXAMINERS

TO THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA:

Petitioner, MICHAEL DAPPOLONIA, presents this, his petition for a writ of certiorari and states:

1. Petitioner seeks to have reviewed an order of the Board of Chiropractic Examiners of the State of Florida, said Order being dated the 15th day of July, 1976 and filed with the Secretary of State of the State of Florida on the 15th day of July, 1976.

2. This petition is presented under and pursuant to Article V, Section 4, of the Florida Constitution, and Rule 4.1 and 4.5c of the Florida Appellate Rules and Florida Statute Section 120.68 (1975).

3. This petition is accompanied by a certified copy of the Order which Petitioner seeks to have reviewed, a certified transcript of the proceedings of the Board of Chiropractic Examiners of the State of Florida held on Thursday, July 15, 1976 wherein the State Board adopted said final Order, a copy of a proposed recommended order including proposed findings of fact and requested conclusions of law which were submitted on behalf of the Petitioner in the course of the proceedings below, and a supporting brief.

4. The following are the facts of the case:

a. The Petitioner is and was at all times pertinent to this action a chiropractor licensed by the Florida State Board

of Chiropractic Examiners and holds license number 865. (Final Order - page 2; hereinafter references to the Final Order will be designated as F.O. followed by the page of the Final Order.)

b. The Petitioner is and was at all times pertinent to this action a naturopath licensed by the Florida State Board of Naturopathic Examiners and holds license number 548. (F.O. - 3)

c. During 1975 the Petitioner treated SUZANNE CARTER for fainting spells. Miss Carter was brought to the Petitioner by her mother. Petitioner's name was suggested to Miss Carter's mother by a friend. (F.O. - 2)

d. In treating Miss Carter the Petitioner used a diagnostic instrument known as a biometer, the purpose of which was to diagnose the condition of the patient. (F.O. - 2)

e. As part of the treatment of Miss Carter the Petitioner prescribed pills, known as Celoids. (F.O. - 2)

f. On September 2, 1975 the Respondent filed an administrative complaint against the Petitioner charging him with treating a patient by the use of a diagnostic instrument not taught in the regular course of instruction in a college recognized by the Board of Chiropractic Examiners, which constitutes fraud and deception in the practice of chiropractic and also charged the Petitioner with prescribing medication consisting of celoids, which also constituted fraud and deception in the practice of chiropractic. (F.O. - 1 and 2)

g. On January 26, 1976 a formal hearing was held under the provisions of Florida Statutes section 120.57 (1). Said hearing was before a hearing officer assigned by the Division of Administrative Hearings. (F.O. - 1 and 2)

h. During the course of said proceedings and in connection therewith the Petitioners, on or about February 16, 1976, filed a proposed recommended order which included proposed findings of fact and requested conclusions of law relative to the charges against Petitioner. (Hereinafter the proposed recommended order shall be referred to by the designation P.R.O., followed by the appropriate page number of said P.R.O.)

i. On April 16, 1976 the hearing officer issued a recommended order which concluded that the Petitioner was not guilty of prescribing medication as a chiropractor, but concluded that Petitioner was guilty of using as a chiropractor a diagnostic instrument not taught in regular course of instruction in a college recognized by the Board of Chiropractic Examiners which constitutes fraud and deception in the practice of chiropractic. (F.O. - 1, 4, and 5)

j. On Thursday, July 15, 1976 at Orlando City Hall, 400 South Orange Avenue, Orlando, Florida, the Board of Chiropractic Examiners of the State of Florida met in official session to take action on said recommended order. (Hereinafter references to the transcript of those proceedings will be made by the designation TR followed by the appropriate page number.)

k. The Respondent failed to provide the Petitioner with any notice of said meeting and the Petitioner learned of said meeting on the day said meeting was being held by way of an article in a local newspaper. (TR - 11)

l. Before allowing Petitioner's legal counsel to address the Respondent Board at said meeting, the Respondent voted not to delay the proceedings so as to allow the Petitioner an opportunity to prepare and appear before the Board concerning the consideration of the recommended order. (TR - 7 and 8)

m. After said vote, Petitioner's legal counsel was allowed to address the Respondent Board and formally request that the proceedings be continued until the next regularly scheduled meeting. (TR - 8 to 20)

n. Petitioner's legal counsel requested an opportunity to address the Respondent Board and present oral arguments to said Respondent Board concerning the Board's action on the recommended order. (TR - 21)

o. The Respondent Board denied Petitioner's legal counsel the opportunity to present oral arguments to the Respondent Board. (TR - 26)

p. The Respondent Board voted to adopt the recommended order of the hearing officer. (TR - 33 and 34; F.O. - 1)

5. The order of the Respondent Board revoking the Petitioner's license to practice the profession of chiropractic in the State of Florida departed from the essential requirements of law in the following particulars:

a. The Respondent Board failed to follow the procedures required by Florida Statutes Chapter 120 in that they did not allow Petitioner's legal counsel to present oral arguments and the final order failed to include rulings on each proposed finding of fact and requested conclusions of law.

b. There are no findings of fact that the Petitioner was acting as a chiropractor when using the diagnostic instrument.

c. The Respondent Board exceeded their authority in adopting said final order contrary to the provisions of Florida Statute section 460.24 and section 460.262.

d. It is impossible to use a diagnostic instrument not taught in the regular course of instruction in a college recognized by the Board of Chiropractic Examiners because the Board has not validly adopted any list of approved colleges.

WHEREFORE, Petitioner requests this Court to grant a writ of certiorai and enter its order quashing the decision and order hereby sought to be reviewed, and to grant such other and further relief as shall seem right and proper to the Court.

John W. Bowen of
ROWLAND, PETRUSKA, BOWEN & McDONALD
308 North Magnolia Avenue
Orlando, Florida 32801

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CAROL REILLY, ESQ., Assistant Attorney General, The Capitol, Tallahassee, Florida 32304, by mail, this 16th day of August, 1976.

/s/ Attorney

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

MICHAEL DAPPOLONIA,

Petitioner,

vs.

BOARD OF CHIROPRACTIC EXAMINERS OF THE STATE OF FLORIDA,

Respondent.

RECEIVED
JUN 9 1977
ATTORNEY GENERAL'S

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

TO THE SUPREME COURT OF THE STATE OF FLORIDA:

PETITIONER, MICHAEL DAPPOLONIA, presents this, his Petition for a Writ of Certiorari and states:

1. Petitioner seeks to have reviewed an Order of the District Court of Appeal, Fourth District, dated and filed in the records of said District Court on the 7th day of April, 1977, the same being case number 76-1757 of said District Court. Said Order of the District Court became final upon the denial of a PETITION FOR REHEARING which denial occured on the 25th day of May, 1977.

2. This petition is presented under and pursuant to Article V, section 4 of the Florida Constitution, and Rule 4.5 c of the Florida Appellate Rules.

3. This petition is accompanied by the following conformed copies of those portions of the record as are necessary to show jurisdiction in this Court:

a. Petition for Writ of Certiorari to the Board of Chiropractic Examiners, filed with the District Court of Appeal, Fourth District of Florida, together with a copy of the Order of the Board of Chiropractic Examiners and a copy of a proposed recommended order including proposed findings of fact and requested conclusions of law which were submitted on behalf of the Petitioner in the Administrative proceedings. (The transcript of proceedings of the Administrative Board and Petitioner's brief filed with the Petition for Writ of Certiorari are not attached hereto as they are not necessary

for the determination of jurisdiction.)

b. Order from the District Court of Appeal, Fourth District, filed and dated April 7, 1977, denying the Petition for Writ of Certiorari.

c. The Order of the District Court indicating the date of denial of the Petition for Rehearing.

4. The following are the facts of the case:

a. The Petitioner filed a Petition for a Writ of Certiorari to the Board of Chiropractic Examiners before the District Court of Appeal, Fourth District, on the 16th day of August, 1976.

b. The Petition sought to have the District Court review an Order of the State Board of Chiropractic Examiners entered on the 15th day of July, 1976. Said Order adopted as its own Final Order the recommended Order of a Hearing Officer of the Division of Administrative Hearings of the Department of Administration of the State of Florida.

c. Prior to the submission of the recommended order of the Hearing Officer to the Board of Chiropratic Examiners, Petitioner submitted to said Hearing Officer a proposed recommended order which included proposed findings of fact and requested conclusions of law for the Hearing Officer to rule upon in the Hearing Officer's recommended Order submitted to the Board of Chiropractic Examiners.

d. Neither the recommended order of the Hearing Officer nor the Final Order of the Board of Chiropractic Examiners adopting said recommended order of the Hearing Officer contained any express rulings on each proposed finding of fact and proposed legal conclusions submitted by the Petitioner to the Hearing Officer as required by Section 120.59 (2), Florida Statutes (1975).

5. On the foregoing facts the District Court was presented with the following point of law:

That the Final Order of the Board of Chiropractic Examiners departed from the essential requirements of law by failing to follow the procedures required by Florida Statutes, Chapter 120, in that they did not include within said Final Order rulings on each proposed finding of fact and requested conclusion of law submitted by the Petitioner.

The District Court of Appeal, Fourth District, denied the Petition for Writ of Certiorari thereby necessarily ruling that the Board of Chiropractic Examiners had not departed from the statutory requirements by failing to include explicite rulings on each proposed finding of fact and conclusions of law submitted by the Petitioner.

6. The same point of law was involved in the case of Stuckey's of Eastman, Georgia v. Department of Transportation, decided by the District Court of Appeal, First District, on the 9th day of December, 1976. This decision was reported in 340 So. 2d page 119 and a copy of the decision is attached to this petition as Exhibit "1". The facts involved in Stuckey's v. Department of Transportation were as follows:

a. The Department of Transportation had rendered a final order against Stuckey's of Eastman, Georgia in proceedings that were subject to Florida Statutes Chapter 120, the Administrative Procedure Act.

b. The final order of the Department of Transportation adopted as its own the recommended order of the Hearing Officer of the Division of Administrative Hearings of the Department of Administration.

c. During the proceedings before the Hearing Officer, Stuckey's submitted to the Hearing Officer proposed factual findings and conclusions of law. The Hearing Officer's proposed order failed to include explicit rulings on each proposed finding of fact and conclusion of law as did the Department's order adopting the proposed order as its own.

d. On these facts, the District Court of Appeal, First District ruled as follows:

> The Department of Transportation departed from the essential requirements of law by failing to follow the procedures required by Florida Statutes, Chapter 120, in not including in its final order explicit rulings on each proposed finding of fact and conclusion of laws submitted by Stuckey's.

7. The decision of the District Court of Appeal, Fourth District, which Petitioner seeks to have reviewed is in direct conflict with the above mentioned decision of the District Court of Appeal, First District. Because of the reasons and authorities to be set forth in Petitioner's brief, it is believed that the decision hereby sought to be reviewed is erroneous and that the conflicting decision of the District Court of Appeal, First District, is correct and should be approved by this Court as the controlling law for the State of Florida.

WHEREFORE, Petitioner requests this Court to grant a Writ of Certiorari to review the decision of the District Court of Appeal, Fourth District, and thereafter enter its Order quashing the decision and Order hereby sought to be reviewed, approving the decision of the District Court of Appeal, First District, as the correct decision and granting such other and further relief as shall seem right and proper to the Court.

John W. Bowen, Esquire,
ROWLAND, PETRUSKA, BOWEN & McDONALD
308 North Magnolia Avenue
P. O. Box 305
Orlando, Florida 32802

Attorney for the Petitioner

CERTIFICATE OF SERVICE

I DO CERTIFY that copies hereof have been furnished to ROBERT L. SHEVIN, Attorney General, and Carol L. Reilly, Assistant Attorney General, Tallahassee, Florida, Attorneys for Respondent, BOARD OF CHIROPRACTIC EXAMINERS OF THE STATE OF FLORIDA, by hand delivery this 9th day of June, 1977.

John W. Bowen

APPENDIX D

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO. 76-1757

MICHAEL DAPPOLONIA,

Petitioner,

vs.

BOARD OF CHIROPRACTIC
EXAMINERS OF THE STATE
OF FLORIDA,

Respondent.

PETITION FOR RE-HEARING

THE PETITIONER, MICHAEL DAPPOLONIA, by and through its undersigned attorneys, petitions this Court for a re-hearing in this cause based upon the following ground:

1. The Court's per curiam denial of the Petitioner's Writ of Certiorari was a ruling against the Petitioner on all points which Petitioner presented for review. One of the points presented for review was that the Final Order adopted by the Respondent Board failed to comply with the Administrative Procedures Act by not including a ruling upon each proposed finding of facts submitted by the Petitioner and by not including a brief statement of the grounds for denying the requested specific conclusion of law submitted by the Petitioner. This argument was presented in Point II of Petitioner's Brief. Points III, IV, and V are related to the deficiencies in the Final Order in that the Final Order should have addressed these points as they were presented to the Hearing Officer by way of the proposed Order submitted by the Petitioner to the Hearing Officer.

POINT II of the Respondent's Brief replies to the Petitioner's claim that the Final Order did not conform to the Administrative Procedures Act. In that point the Respondent argues that the Final Order was not required to rule explicitly on any proposed findings of fact or conclusions of law submitted by the Petitioner to the

CONSIDERED AND DENIED
5/25/77 ETC
EMMETT J. CONSKEY, CLERK
4th DISTRICT COURT OF APPEAL

Hearing Officer. The Respondent Board argues on pages 10 and 11 of Respondent's Brief that the failure to file exceptions to the Hearing Officer's recommended Order constitutes a bar against the Petitioner complaining about the Final Order adopted by the agency.

The First District Court of Appeals has recently ruled on precisely the issue presented by Point II in Petitioner's Brief and on the defenses to that issue presented by the Respondent as set forth above. That case is Stuckey's of Eastman, Georgia v. Department of Transportation, 340 So. 2nd 119 (Fla. 1st DCA, 1976) which was decided and published after Briefs were submitted but before the Final Order came down in the present case. In the Stuckey's case, the Petitioner had submitted to the Hearing Officer proposed factual findings supporting conclusions of law upon which the Petitioner was going to rely. The proposed Order did not contain the specific rulings on said proposed findings of fact or conclusions of law. Stuckey's did not file any exceptions to the proposed Order with the State agency involved and the final agency Order adopted the recommended Order as its own Final Order. The Court ruled that the failure of the agency to rule explicitly on the issues presented by the Petitioner denied the Petitioner of the rights secured by the Administrative Procedures Act,

> "...namely, the right to raise pertinent factual issues for administrative determination, to submit proposed findings on those issues, to receive an explicit ruling on the matters thus submitted and to preserve them for Judicial review."

The agency had claimed that the failure to file exceptions barred the Petitioner from raising the issue with respect to the Final Order. The Court specifically rejected that argument.

If this Court's per curiam denial of the Petition for Writ Certiorari stands, it would be in direct conflict with the opinion and ruling of the First District Court of Appeal in the Stuckey's case cited above. The Petitioner respectfully requests that the Court reconsider its denial of the Petition for Writ of Certiorari and Order that the Final Order of the Respondent Board be vacated and the cause remanded to the Respondent for rulings, after recommendations have been made by a Hearing Officer, on the proposed findings are fact and conclusions of law which were submitted by the Petitioner before the Hearing Officer.

Respectfully submitted,

John D. Bowen of
BOWLES, PETRUSKA, BOWEN & McDONALD, P.A.
308 North Magnolia Avenue
P. O. Box 305
Orlando, Florida 32801

Attorneys for Plaintiff
phone #305/841-8170

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by mail to Robert L. Shevin, Attorney General, and Carol L. Reilly, Assistant Attorney General, 725 South Calhoun Street, Bloxham Building, Room 103, Tallahassee, Florida, 32304, this 22 day of April, 1977.

John D. Bowen
Attorney at Law